THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 143 OF 2017

(ARISING FROM WAKISO CHIEF MAGISTRATE COURT CRIMINAL CASE NO. 356 OF 2016)

WASSWA KIGUNDU ---------- APPELLANT

VERSUS

UGANDA ---------- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

This appeal arises from the Judgment of Magistrate Grade I Karungi Doreen Olga, where by the Appellant Wasswa Kiggundu was convicted on four counts of Burglary contrary to Section 245 of the Penal Code Act, Theft contrary to section 251 (1) and 261 of the Penal Code Act and Stealing from a vehicle contrary to section 261 and 267 (c) of the Penal Code Act.

The trial Magistrate found that on the night of 05.02.16, at Ssumbwe Village in Wakiso District, the accused persons broke into the wall fence of Kisitu Solomon, with intent to steal therein and did indeed steal two side mirrors from motor vehicle Registration No. UAU 583A, both valued at Shs. 530,000/- the property of Solomon Kisitu.

That on the same night, also in the same village, the accused willfully and unlawfully cut a wire fence broke glass and alarm system valued at Shs. 670,000/- the property of Kisitu Solomon. Further that the accused person stole 2 side mirrors from the vehicle of Solomon Kisitu valued at Shs. 530,000/-.

The evidence of the prosecution was that during the night in question while Pw1 was praying in his sitting room at 3am, his car alarm went off. When he ran out, he saw two men jump over the fence, and noticed that his wire fence had been cut. This was corroborated by Pw2 his wife who stated that she heard Pw1's alarm, she peeped through the window and saw the A1 (Appellant) jump over the fence, while another person remained inside the car.

That she recognized the Appellant when he turned and looked behind with the help of the electric lights and that he knew him before the incident.

Pw4 the dog handler states that the sniffer dog led them to Nalongo's home, where it entered and remained there, A pair of pliers and wire cutter were recovered from there.

But nothing belonging to the complainant was recovered from there.

The accused denied the offence and knowing the complainant nor his house. He raised an alibi stating that at the time of the alleged offence, he was in Soroti.

Dw3 sated that he welcomed the Appellant to Soroti as he is the one who had called him for work and he remained there until May, 2017.

Dw2 also confirmed that by the time the Police searched their home, Appellant had left for Soroti although the dog sat in their home.

But that the items recovered were home stuff which they had for daily use.

However, the trial Magistrate accepted the evidence of the prosecution on the ground that the complainant and his wife had seen Appellant before taking photographs of their home and had even interacted with him. And that Pw2 identified him when he turned and looked behind while escaping from the scene. Further that, the sniffer dog led the Police to the accused's home. And that the Appellant's subsequent conduct of disappearing from home leaves a lot of questions. Plus that Dw3 stated that she was not sure of what happened during the night of 05.02.17 before the Appellant left for Soroti while Dw2 sleeps in a

different room from that of the Appellant and does not know if he left the room any time that night.

Further that, recovery of the cutter from the accused house after the dog led them there is all circumstantial evidence pointing to the guilt of the accused person and questions the _.

Counsel for the Appellant submitted on the five grounds of appeal beginning with the 2nd and 3rd ground, then grounds 4 and 5 and concluding with ground 1. They are accordingly dealt with in that order.

The 2nd ground of appeal – The trial magistrate ignored Appellant's defence of alibi and thereby arrived at wrong conclusion.

It was the evidence of Dw1 and Dw3- See p.12 of the proceedings on 10.04.17 Dw3 called Dw1 alerting him of a building job at Bukedea that was on 03.02.17.

Dw3 could not wait for Dw1 and therefore proceeded to Bukedea where on 05.02.17 at 3pm he received Dw1 the Appellant whom he later took to the construction site.

The record reflects that the defence of alibi was raised by Dw1 (Appellant) but it was never rebutted by the State.

I therefore submit that this court be pleased to find that the trial Magistrate erred in law and fact when she failed to answer that defence and thereby reached a wrong decision.

Ground 3. Trial Magistrate erred to base conviction on identification when the conditions of identification were not available and thereby reached a wrong decision.

At trial, the prosecution brought five witnesses and Pw1, the complainant Kisitu Solomon at P.4 of the proceedings of 14.06.16 stated that **"I was told of a person that comes and takes photos of my house. And that that person had a head like a box face".**

It is clear that Pw1 had never seen the Appellant and that the Appellant does not have a head with a box face.

At the same page, Pw1 states that he used 2,200,000/- Shillings which he paid to the authorities especially Police to trace the Appellant.

In the absence of the complainant's prior knowledge of the Appellant, there is no way he could have identified him that night.

On the record of proceedings at P.6-21 was the evidence of Pw2 that it was he husband who escorted the sniffer dog but had not identified the thief.

Further that the Appellant used to pass by and peep and took pictures of their house.

I submit that these are not convincing conditions that should have swayed the trial Magistrate in finding that it was the Appellant who committed the said offence. We pray court finds that the conditions were non existence and therefore trial Magistrate erred in law and fact and thereby reached a wrong decision.

4th Ground: Trial Magistrate erred in law from a case which has detailed evidence to convict the Appellant without corroboration evidence is __ thereby reaching a wrong conclusion.

P.2 and 6 of the proceedings dated 14.10.16 – P.6 Pw2 stated that she warned the Appellant to stop coming to their house.

It is clear with the evidence of Pw1 that he never knew the Appellant and it is the evidence of Pw2 that her husband escorted the sniffer dog but had not identified the thief.

The trial Magistrate did not take precaution in considering the evidence of Pw1 and Pw2 a married couple which was full of contradictions. And by relying solely on their evidence without any other corroborations evidence as pictures from the camera allegedly taken by the Appellant and the phone which was never recovered leaves only on conclusion that is the trial Magistrate based her conviction on evidence of a married couple without corroborative evidence and therefore reached a wrong conclusion.

This court should be pleased to find that there was no corroborative evidence as required by law, and therefore find that the trial Magistrate erred in law and reached a wrong decision.

5th Ground: The trial Magistrate erred when she ordered Appellant to pay compensation of Shs. 3,000,000/- on top of conviction.

It is unorthodox for a criminal case to pass orders of compensation more especially when the conditions do not allow and grounds for compensation do not exist.

P.4 proceedings of 14.10.16, it is clear that Pw1 Kisitu dispensed money to the authorities of Shs. 2,200,000/- to Police and prosecution authorities.

This leads to only one conclusion that this matter was marred by prosecutorial misconduct and made it appear like the agencies of Government are out for money.

This kind of impact can be seen at P.7 of the proceedings by the evidence of Pw3 a Crime Preventer.

At P.7- during the process of arrest of the Appellant, the record reflects that a Crime Preventer was set out to arrest Appellant by the was under strict instructions from Pw1 to arrest A2 not because he was a peer and an associate of A1 the Appellant.

The record shows that the end result was that at the **"No case to answer"** Stage of the trial – P.1 of the proceedings dated 10.04.17 (two record of proceedings 14.10.16) A case had not been made out against A2 and court is very emphatic on the reasons **"A2's arrest was merely done on suspicion and speculation and therefore I acquit him on no case to answer"**

I submit that an order for compensation cannot be based on events and facts that spell out misconduct on part of the prosecutorial authorities, and if it must be answered for Appellant to pay compensation, it should be based on the evidence and the law.

An accused person cannot compensate moneys dispensed on agencies of Government. That should not be the basis of compensation.

The answers of the trial Magistrate on top of conviction were done in error and in excessive exercise of Judicial power.

Court should be pleased to find that the award of compensation was out of error and therefore should be set aside.

Ground 1: Trial Magistrate erred in law and fact when she failed to evaluate the evidence and reached a wrong conclusion.

Record of proceedings P1 of 10.04.17 – issue arose out to disclosure which is a constitutional right. But the same was never availed to the Appellant at trial to prepare his defence. It could have been an oversight by the defence Counsel. The role of defence Counsel cannot be underestimated but most importantly, the trial Magistrate should have warned herself on proceeding with a trial in absence of these very important aspects of our criminal justice system.

By proceeding without them, she could not have evaluated the evidence as a whole. The end result was a wrong conclusion.

The appeal should be allowed conviction and orders of the trial Magistrate set aside, we so pray.

Counsel for the state in response to the grounds in the same order they were argued submitted:-

Ground 2: Defence of alibi- Counsel made reference to evidence of Dw3 and Dw1`. Dw3 stated that he had on the 03.02.16 communicated to the Appellant about work he was supposed to be doing in Bukedea.

On P.12 of record of proceedings dated 25.07.17 Dw3 clearly states I did call him at that time on 03.02.16 and he came on the 05.02.16 and I took him to the site. The site is found in same village in Soroti.

I contend that, the evidence of the prosecution witnesses is that the vandalization and theft of Pw1's property happened on the 04.02.16.

Evidence of Pw1 on the record of eth 14.11.16 indicates that it was around 3am when he heard his car make an alarm when he opened the window he saw two people in eth car. He made an alarm and then he

saw (A1) Appellant jumping over the fence. But he did not see the second person he was with.

He had lights at his residence and was therefore able to see them clearly.

Pw2 wife of Pw1 told court that she knew A1 had seen him a number of times pass around their house and peep through the gate and take pictures.

On the night about 3am she heard Pw1 make an alarm. As she also moved towards the window, she saw two boys who had opened their vehicle. When the complainant (Pw1) made the alarm, the two boys took off (A1) (Appellant) turned behind before he jumped over the wall and she managed to identify him with the help of the lights as the person who had been passing around their home on numerous occasions and taking pictures.

The two witnesses clearly identified the Appellant at the scene of crime.

The law on identification clearly discloses the issue. ***Refer to the case of Abdulla Bin Wendo vs. R [1953] 20EACA "The need for corroboration not withstanding the call has power to act on the identification evidence of a sole identifying witness if it warms itself and the assessors that the identification was positively made without a possibility of error".***

The conditions that were given that could aid in proving positive identification were

1) Lighting
2) Distance from which the identification was made.
3) Whether the witness knew the accused before.

We c__ that from the evidence of Pw1 and Pw2, they clearly saw the Appellant and placed him at the scene of crime. More as specifically, Pw2 who had seen him on numerous occasions and even made a report to Pw1.

The appellant was placed at the scene of crime and therefore the alibi could not stand.

The fact that he was in Budekea is hours distance from Kampala, at most five hours from Kampala therefore if the offence happened at 3am, the Appellant had ample time to trace and went to Bukedea.

The trial Magistrate did not therefore misdirect herself in ignoring the alibi and presentenced. – See the case of **Abdulla Nabulere Ca Cr. App No. 09/78 P.5** – it was stated that ***"there is clear statutory provision that for the proof of any fact a plurality of witnesses is not necessary. "And reference is made to S.132 Evidence Act".***

And that ***"there is no particular magic in having 2 or more witnesses testifying to the identify of the accused. What is important is the quality of identification".***

Ground 3: It is in respect of evidence of two identifications where the conditions were not conclusive:-

Counsel made reference to the fact that Pw1 described someone with a box head. We cited that on P.4 proceedings of 14.11.16, the description of someone with a box head was in regard to the second person. The record reads **"the second person was shabby, I saw he was in dark things. He was putting on __ that is had no cap. I could clearly see his box head".**

That was in reference to A2 and not A1 the Appellant.

Pw2 – clearly stated she had seen A1 pass around their home. P.7 proceedings of 14.11.16.

In regard to ground 3, Counsel made reference to the Shs. 2,200,000/- __ to chase the Appellant. We contend that Pw1 clearly told court of the expenses that he had in repairing the car. The receipts to that effect were tendered in court Exhibits D_{2A-2C}.

There was therefore nothing to show that Pw1 paid for the service to ensure that the suspect was brought to court.

Ground 4: Alleged lack of corroborative evidence: The trial Magistrate in her judgment P.2 resolution evaluation of evidence clearly stated that evidence of Pw1 was corroborated by that of his wife who also looked

through the window, saw and identified the Appellant as one of the two assailants.

The trial Magistrate made reference to P.3 Judgment to the evidence of Pw4 the dog handler who described what happened when he brought the Police dog to the scene and how it led them to the home of the Appellant which was about 1km away from Pw1's home.

The trial Magistrate made reference to the evidence of Dw2 that is mother of the Appellant who confirmed that the Police dog went and sat in her home.

He contended that the trial Magistrate clearly evaluated the evidence on record when she even further made reference to the conduct of the Appellant that is his subsequent disappearances from home immediately after the commission of the offence.

The conduct of disappearance has been found as a highly incriminating piece of circumstantial evidence. And that many times courts have taken this factor into consideration to support a conviction. – See case **Remegirus Kiwanuka vs. Uganda Cr. App No. 41/95** and **Uganda vs. Drasiku Anania Cr. Case 14/13** where the same issue was discussed.

The trial Magistrate therefore ably evaluated the evidence before her and pointed out in her judgment what she found as corroboration.

Ground 5: Payment of compensation: Counsel contended that the order of compensation was unorthodox. But the law provides a trial Magistrate power to order compensation for material loss or personal injury in consequence of the offence committed. – See s. 197 (1) MCA and its upon the discretion of the Magistrate to order compensation in addition to any other lawful punishment as is deemed fair and reasonable. There was therefore nothing unorthodox about the compensation ordered by the trial Magistrate.

In conclusion, Counsel referred to the discharge of A2 – P.1 of the proceedings of 10.04.17.

Arrest is a process in the criminal justice system. If any of the accused persons is acquitted on a no case to answer, this does not mean that the accused was arrested out of malice or undue influence.

It is normal procedure for accused to be held as suspects, paraded before court and for court to discharge or convict as it finds the evidence either incriminating or not.

The act of Pw3 in arresting the two accused persons is indeed out of information received that there were two assailants at the scene of crime. His vigilance should therefore not be faulted if indeed it fell short in respect of A2.

The trial Magistrate rightly evaluated the evidence presented before her and the appeal there be dismissed, conviction and sentences upheld. We so pray.

Counsel for the Appellant in rejoinders submitted that the state referred to evidence of Pw2 stating that the conditions of identification were favorable.- Court should refer to P.7 of A1's cross examination of Pw2 (proceedings of 14.10.16).

Pw2 says **"yes I know A1. You used to pass my home and peep. I even went out and asked you what you wanted. You told me you admired our house. I also do not know why you used to come. I even told my husband. He even told me that he saw you one day. The first one ran away. I saw you turned around. I looked below. That is all"**

Abdulla Bin Wendo's case (Supra) should look at cross on evidence says that *"evidence of lovers is marred with spite, envy and jealousy. And as a matter of Judicial practice to arrive at a safe conclusion, such evidence needs to be corroborated".*

In the absence of corroboration, the evidence of Pw1 and Pw2 who are lovers could be treated as a scheme to eliminate a potential suitor and youthful Appellant is not an exception.

The evidence of Pw2 in cross examination by Appellant **"you used to pass my home, I even went and asked you what you wanted. You told me you admired our house. I also don't know why you**

used to come. I warned you to stop coming around. I even told my husband".

Given the work of cross on evidence; it is equally important for a trial court to caution itself if it has to rely on the evidence of one identifying witness and in this case, Pw1 and Pw2.

It is pw2 who said she identified Appellant. Pw1 was told of the existence of Appellant by Pw2. These are lovers in absence of corroboration and there exists on the record, the court arrived at the wrong decision.

We reiterate our earlier prayers that conviction and orders were arrived at without strict compliance with the requirements for corroboration.

The ground of appeal should succeed.

Defence of alibi: The law of Alibi is sated in the case of **Kamya Johnson Wavamunno vs. Uganda SCCA 16/02.**

The principal is that once an accused person raises the defence of alibi, it is the duty of the State to water down the alibi and place him at the scene of crime. If it fails in so doing, then it has failed to discharge its constitutional duty to prove the guilt of the prisoner.

Counsel stated that Bukedea is his away from Kampala. If the Appellant was a smooth criminal, invaded Pw1 and Pw2 home at 3am, found them in a prayerful mood, vandalized their car, cut the wire mesh/barbed wire and went back home 1 km away from home of Pw1 and Pw2 and at 5am – (evidence of Dw2 left and booked a bus ticket to Bukedea and arrived at Bukedea at 3pm against the watchful eye of the prosecutorial authorities, then the Appellant has __ (that is sophisticated slippery, has a gang is a gang master).

But the Appellant is a simple builder what was discovered during the search of his home were clippers and wire mesh.

Dw2 mother of the Appellant gave a steadfast account of the whereabouts of the Appellant. This was ignored by the trial Magistrate. And the prosecution never bothered to water down the defence of alibi.

And in so doing they denied the Appellant that defence which led to the wrong conclusion.

There is no circumstantial evidence with a builder who leaves his home to go and find work.

According to the record, the evidence of Dw3, the movements of the Appellant were not those of a fugitive of justice.

The movements were a systematic pattern of an everyday Uganda who leaves his home to find work.

Conclusively, we made reference in earlier submissions to pre trial disclosure which was completely omitted at trial level. – See the case of **Soon Yeon Kong Kim & Another vs. Attorney General Constitution Ref 6/07**. *"The act of pre trial disclosure is an aspect of fair hearing under Article 28 Constitution and it is absolute".*

A court that proceeds with trial of an accused person without disclosure to enable accused to make out his defence; the results of the court are fruits from a poisonous tree. They do not reflect a proper exercise of Judicial discretion and the court should not allow them to stand.

We reiterate our earlier prayer that appeal should be allowed and the conviction set and orders of the trial Magistrate set aside. We so pray.

With leave of court, Counsel for State: - The Soon Yeon authority does not state that the right to disclosure is absolute. (Copy should be availed). It is required but not automatic and absence of the same does not lead to nullity of proceedings.

I heard the submissions of both Counsel in respect of this appeal and have given them the consideration that they deserve.

In determining this appeal, I take into account the principle established by decided cases to the effect that *"it is the duty of the First Appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own _and failure to do so amounts to an error of law"* – Refer to the case of **Kifamunte Henry vs. Uganda SCCA No. 10/1997.**

Sniffer Dog

"No evidence was adduced on the skill of the dog". While the dog handler was heard (PW5) besides that, the Magistrate did not indicate in her judgment that she was __ to the need of __ tracker dog evidence with caution. While the dog is said to have led the Officer to Appellant's home, no other credible evidence pointing to the participation of the Appellant in the alleged crime. – **Uganda vs. Muharwe Chris and Kyomugisha Jovia HCM 0.5 CR.CN 0011/2013.**

The pliers and wire cutter found in the home were explained by Dw3 the mother of the Appellant as being used for normal work.

Identification: The following guidelines have been issued by the Supreme Court regarding the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. *"The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which identificat5ion is claimed to have been made were or were not difficult, and to warm itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence continuously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out in so doing."*

By setting up an Alibi, an accused person does not assume the burden of proving its truthfulness so as to raise a doubt in the prosecution case. (The Appellant testimonial and that of Dw3 who invited him to Bukedea was sufficient to raise the alibi which the prosecution was only bound to disprove).

One of the ways of disproving an alibi is to investigate its geniuses as was stated in the case of **Andrea Asemua & Another vs. Uganda Cr App 1/1998 UG SC 23** where the supreme court cited with approval the authority of **R vs. Sukha S and Wazir Singh & Others (1939) 6EACA** 145 where the Court OF Appeal for East Africa observed that:-

"if a person is accused of anything and his defence is an alibi, he should forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he had not been preparing it in his interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of

inquiring into the alibi and if they are satisfied as to its geniuses, proceedings will be stopped".

In absence of a statutory provision, one would expect the prosecution to adduce evidence of the investigating Officer who would testify as to whether or not an accused person raised the alibi at the earliest opportunity and the evidence would be one of the factors to take into account before admitting or rejecting the alibi. – **Ainomugisha vs. Uganda Cr. App No.19/15 [2017] UGSC 12 (28.04.17).**

Looking at the judgment and proceedings of the trial court in the present case, it is apparent that when the prosecution case was being heard, the accused person were not represented. They admitted the cross examination of the prosecution witnesses.

When the accused got Counsel eventually, the application was made to the trial Magistrate to recall the prosecution witness for cross examination by Counsel for the accused.

However, the trial Magistrate declined on the ground that she had already found that the accused had a case to answer and therefore she could not set aside the ruling to recall the witnesses.

This court finds that this was an error on the part of the trial Magistrate since *"the functus officio rule only bars a magistrate who has determined a case and passed a sentence from re-opening the case".*

In the present case, the matter had not yet been determined, the Appellant and his Co-accused ought to have been given an opportunity to cross examine the prosecution witnesses through their Counsel. The right to legal representation is guaranteed by the Constitution.

The refusal of the trial Magistrate to recall the prosecution witnesses occasioned a miscarriage of justice to the accused (now Appellant) by denying him an opportunity for fair trial that is guaranteed by the Constitution.

For those reasons, I do not find it necessary to delve in the other grounds of appeal raised by the Appellant.

The appeal is allowed and the decision and sentence of the trial Magistrate set aside. It is directed that a retrial be conducted before another Magistrate of the same jurisdiction.

The file is to be returned to the Chief Magistrate to be placed before another Magistrate for that purpose.

The accused person is set free forthwith.

FLAVIA SENOGA ANGLIN
JUDGE
07.06.18